Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

INDUSTRIAL BANK, N.A.,

Petitioner,

v.

CITY BANK, SCOTT SEIDEL, CHAPTER 7 TRUSTEE and LARRY BROWN, Debtor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents the Court with an opportunity to resolve a significant conflict which exists among the circuit courts over a fundamental provision in bankruptcy law:

1. What is the effect of violating the automatic stay of 11 U.S.C. § 362?

    a. Is a stay violation "void" or "voidable"?

    b. If a stay violation is "void" or "voidable" can it be cured by retroactive annulment of the automatic stay under 11 U.S.C. § 362(d)(1)?

2. Does the "effect of dismissal" under 11 U.S.C. § 349(b) validate an action that was taken in violation of the automatic stay under 11 U.S.C. § 362?

3. Must a creditor seek retroactive annulment of the automatic stay under 11 U.S.C. § 362(d)(1) for a stay violation that occurred in a bankruptcy proceeding that has been dismissed?

CORPORATE DISCLOSURE STATEMENT

Petitioner hereby identifies IBW Financial Corporation as a parent corporation owning 10% or more of Petitioner's stock. No publicly held company owns 10% or more of the stock of Petitioner.

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Petitioner Industrial Bank, N.A., respectfully petitions for a writ of certiorari to reverse the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reproduced in the Appendix at App. A. The opinion of the district court is reproduced in the Appendix at App. B. The opinion of the bankruptcy court is reproduced in the Appendix at App. C.

JURISDICTION

The court of appeals judgment was entered on May 4, 2006. A timely petition for rehearing was denied on May 31, 2006. App. D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 8:

The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States;

2. 11 U.S.C. § 362:

Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of

this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

or

3. 11 U.S.C. § 349:

Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

STATEMENT

Petitioner seeks review of the ruling of the Fifth Circuit Court of Appeals which reversed the district court and affirmed the bankruptcy court's ruling that reclassified Petitioner's proof of claim from a secured claim to an unsecured claim.

The debtor in bankruptcy below is Larry Brown, a former professional football player who played for the Dallas Cowboys and Oakland Raiders. While playing for the Dallas Cowboys, he was named the Most Valuable Player in Super Bowl 1996. While playing for the Oakland Raiders he earned an NFL Deferred Compensation Agreement that was worth $1.2 million.

After retiring from football, Brown went into business in Fort Worth, Texas. In 2002, he approached the Petitioner, a banking institution in Washington, D.C., for a loan for business use. Petitioner granted the loan but Brown failed to

repay it when it became due. Brown filed a series of bankruptcy proceedings to reorganize his debts as will be explained below.

The First Bankruptcy Proceeding.

In 2002, Brown filed his first bankruptcy proceeding under Chapter 13 of the Bankruptcy Code. 11 U.S.C. §1301, *et seq.* That proceeding was dismissed, reinstated and then dismissed. App. C. Petitioner was not listed as a creditor and it had no knowledge of the bankruptcy proceeding when it filed suit to recover its debt in a Washington, D.C. court. Petitioner obtained a judgment by default in the amount of $251,474.02.

The Second Bankruptcy Proceeding.

Brown filed a second bankruptcy proceeding in 2003. This proceeding was under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §1101, *et seq.* During this proceeding, Petitioner had its default judgment recognized in California. It had a writ of execution issued and served by the sheriff against Brown's NFL Deferred Compensation Agreement with the Oakland Raiders.

The Oakland Raiders acknowledged the writ and responded that it would begin making payments in December 2005. City Bank was a creditor in the second bankruptcy proceeding and examined Brown under Bankruptcy Rule 2004 regarding the Deferred Compensation Agreement with the Oakland Raiders and other issues. The second bankruptcy proceeding was dismissed at the request of the United States Trustee because Brown failed to comply with Chapter 11 requirements. The United States Trustee also requested a

conversion to Chapter 7 or the appointment of a trustee. Neither City Bank, Brown, nor other creditors objected to dismissal of the Chapter 11 proceeding. For a second time Petitioner was not listed as a creditor in Brown's bankruptcy proceeding and it had no knowledge of the proceeding while it took its actions.

The Third Bankruptcy Proceeding.

Brown filed a third bankruptcy proceeding in 2004. This proceeding also was under Chapter 11 of the Bankruptcy Code. Petitioner had its judgment recognized in Texas and sought post-judgment discovery against Brown. It secured a state court sanction order against Brown for his failure to appear at a post-judgment deposition. As before, Brown failed to list Petitioner as a creditor and Petitioner had no knowledge of the bankruptcy proceeding when it took its actions. Only after this state court order was entered did Brown formally notify Petitioner of his third bankruptcy proceeding. Petitioner then filed a fully secured proof of claim based on its default judgment and execution lien against the Deferred Compensation Agreement with the Oakland Raiders.

The Objection to Petitioner's Claim.

City Bank, a creditor that was later joined by Brown before trial, objected to Petitioner's secured claim. It contended that Petitioner achieved its secured status by violating the automatic stay under 11 U.S.C. § 362 that was in effect during the two previous bankruptcy proceedings. City Bank contended that Petitioner's actions were *void* until Petitioner obtained retroactive annulment of the automatic stays of the prior proceedings based on the Fifth Circuit holding in *Sikes v. Global Marine, Inc.* 881 F. 2d 176

(5th Cir. 1989). *Sikes v. Global Marine* is the leading case in the Fifth Circuit that holds that stay violations are voidable and can be retroactively validated by a bankruptcy court under 11 U.S.C. § 362(d)(1). Petitioner contended that the automatic stays of the prior cases were lifted upon dismissal under 11 U.S.C. § 362(c)(2) and that its actions were validated by the "effect of dismissal" under 11 U.S.C. § 349(b). Alternatively, Petitioner requested retroactive annulment of the automatic stays of the prior proceedings under 11 U.S.C. § 362(d)(1) based on equitable factors.

The bankruptcy court agreed with City Bank and held that Petitioner's claim was to be treated as unsecured because Petitioner improved its position due to its violations of the automatic stay during the previous proceedings and that the other creditors should not suffer a detriment because Brown failed to give notice of his bankruptcy filings. App. C. It found no grounds to retroactively annul the automatic stay based on equitable factors under 11 U.S.C. § 362(d)(1). App. C. Petitioner appealed to the district court.

The District Court Decision.

The district court agreed with Petitioner and reversed the bankruptcy court. App. B. It held that the automatic stays of the previous proceedings were lifted upon dismissal and that violations that occurred during those proceedings were cleansed upon dismissal based on 11 U.S.C. § 349(b), along with its legislative history and case law that supported its position. App. B. It held that the case was not governed by retroactive annulment under 11 U.S.C. § 362(d) (1) and it did not review the bankruptcy court's decision not to retroactively annul the automatic stay. App. B. *In re Brown*, 330 B.R. 548 (N.D. Tex. 2005). The district court ordered

Petitioner's claim to be treated as a fully secured claim and that it be given the benefit of its actions taken during the pendency of the first two bankruptcy proceedings. App. B.

After the district court's opinion, Brown's third bankruptcy proceeding was converted to Chapter 7. Scott Seidel was appointed Trustee and along with City Bank appealed the decision to the Fifth Circuit. Seidel did not participate in the proceedings at the bankruptcy court or the district court level. Seidel did participate at the Fifth Circuit level.

The Fifth Circuit Decision.

The Fifth Circuit reversed the district court in an unpublished decision. *City Bank v. Industrial Bank, N.A.*, 2006 U.S. App. LEXIS 11157 (5th Cir. 2006); App A. It held that the district court erred as a matter of law in concluding that the dismissal of the two previous bankruptcy proceedings necessarily served both to lift the automatic stay and to cleanse Petitioner's violations of the stay. App. A. It found that retroactive validation of actions taken in violation of an automatic stay is reserved to the discretion of bankruptcy courts and that the courts are cautioned to use this discretion sparingly because of the adverse impact that validation could have on other creditors who honored the stay. App. A. The Fifth Circuit found that the bankruptcy court correctly exercised that discretion. App. A. The Fifth Circuit denied a petition for rehearing filed by Petitioner. App. D.

REASONS TO GRANT THE PETITION

A. **The federal circuits are in conflict with regard to whether violations of the automatic stay of 11 U.S.C. § 362 are to be treated as "void" or "voidable." This court should grant review to decide this fundamental question because: (1) the answer to this question is of considerable practical importance in the administration of the Bankruptcy Code; (2) there is no "uniform" rule among the circuit courts with regard to the effect of violating the automatic stay under 11 U.S.C. § 362; and (3) Article I, Section 8 of the United States Constitution requires there to be "uniform Laws on the subject of Bankruptcies throughout the United States."**

In 1989, this Court granted certiorari in *New York v. Saper*, 336 U.S. 328 (1989) to resolve a conflict in the circuit courts regarding whether tax claims would bear interest until the date of bankruptcy or until payment. This Court considered that issue to be of considerable practical importance in the administration of the Bankruptcy Act that it merited review so that it could resolve the conflict.

This case reaches that level of practical importance because whether an action that violates 11 U.S.C. § 362 is "void" or "voidable" is an issue that potentially reaches every bankruptcy petition that is filed. Yet, in somewhat of an incredible turn of events since the Bankruptcy Code was adopted in 1978, the effect of violating the automatic stay under 11 U.S.C. § 362 is *not resolved among the federal circuit courts.*

The unanswered question in bankruptcy law has become: What is the effect of violating the automatic stay under 11 U.S.C. § 362? The circuit courts are hopelessly divided over whether a stay violation is "void" and cannot be cured or "voidable" and can be cured by retroactive annulment of the automatic stay under 11 U.S.C. § 362(d)(1).

Article I, Section 8 of the United States Constitution provides that Congress shall have "Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Because there is no uniform rule with regard to whether a stay violation is "void" or "voidable" and whether such violations can be cured, or are cured upon dismissal, there is nothing *". . . uniform . . . on the subject of Bankruptcies. . . ."* with regards to the effect of violating the automatic stay under 11 U.S.C. § 362.

1. This Court's Holding in *Kalb v. Feuerstein.*

This Court most recently dealt with the effect of violating the automatic stay in *Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370 (1940) which was under the Bankruptcy Act of 1898. This Court held that under former Section 75 of that Act, actions that violated the automatic stay were *void ab initio* and could not be cured.

2. The Automatic Stay under the Bankruptcy Code.

Section 362 of the Bankruptcy Code operates "as a stay, applicable to all entities" from the commencement or continuation of proceedings that could have been commenced before the commencement of a case under Title 11, to obtain possession of property of or from the estate or to perfect or enforce any lien against property of the estate. 11 U.S.C.

§ 362(a). The automatic stay relieves the debtor from the pressure and harassment of creditors seeking to collect their claims. It is considered a fundamental debtor protection that gives the debtor a breathing spell from creditors and permits the debtor to attempt a repayment or reorganization plan, or to be relieved of the financial pressures that drove him into bankruptcy. H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978).

Unless an exception exists, the stay applies upon the commencement of a bankruptcy proceeding. The stay may be annulled upon request under 11 U.S.C. § 362(d)(1). Otherwise the stay automatically lifts when the debtor receives a discharge or when the bankruptcy proceeding is dismissed or closed. 11 U.S.C. § 362(c)(2).

When Section 362 of the Bankruptcy Code was adopted, it contained no express provision governing the consequences for violating the automatic stay. In 1984, Congress added Section 362(h) (later moved to Section 362(k)(1)) to the Bankruptcy Code, allowing individual debtors (such as Larry Brown) to recover damages for willful violations of the automatic stay. Pub. L. 98-353, § 304. There is no doubt that bankruptcy courts were provided with authority to sanction stay violations under their civil contempt powers or to provide relief through 11 U.S.C. § 105. *Burd v. Walters, (In re Walters)*, 868 F. 2d 665 (4th Cir. 1989).

3. The Federal Circuits Address the "Void/ Voidable" Debate.

In construing the effect of violating the automatic stay under 11 U.S.C. § 362, many circuit courts relied on this

Court's holding in *Kalb v. Feuerstein* in determining that stay violations under the new Bankruptcy Code were also *void* and could not be cured. These included the First, Second, Third, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. *In re Soares*, 107 F.3d 969, 976 (1st Cir. 1997); *Rexnord Holdings v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994); *In re Graves*, 33 F.3d 242, 248 (3d Cir. 1994); *Smith v. First Am. Bank, N.A.*, 876 F.2d 524, 526 (6th Cir. 1989); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984); *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990); *In re Albany Partners*, 749 F.2d 670, 675 (11th Cir. 1984).

The Third, Sixth and Eleventh Circuits determined that actions that violated the automatic stay were *void*, but that Section 362(d)(1) permitted bankruptcy courts in appropriately limited circumstances to grant retroactive relief from the automatic stay. *In re Siciliano*, 13 F. 3d 748, 750 (3d Cir. 1994); *Easley v. Pettibone Michigan Corp.*, 990 F. 2d 905, 907 (6th Cir. 1993); *In re Albany Partners*, 749 F.2d 670, 675 (11th Cir. 1984). The Sixth Circuit's holding in *Easley* placed that circuit on both sides of this issue because by recognizing that *void* actions could nevertheless be cured by the bankruptcy courts.

The Fifth and Federal Circuits held that violations of the automatic stay were *voidable*. *Sikes v. Global Marine, Inc.*, 881 F. 2d 176 (5th Cir. 1989); *Bronson v. United States*, 46 F. 3d 1573 (Fed. Cir. 1995). The Fifth Circuit reasoned in *Sikes v. Global Marine* that the power of the bankruptcy court under the Bankruptcy Code to retroactively annul the automatic stay required treating of an act violating the stay as "voidable" and not "void" because a "void" act is an act that is "nugatory [sic] of no effect and cannot be cured"

whereas a "voidable" act "may be either voided or cured." *Id.* at 178. The Fifth Circuit in *Sikes v. Global Marine* interpreted 11 U.S.C. § 362(d)(1) as providing bankruptcy courts with the power to retroactively annul the automatic stay back to the filing date of the petition. *Id.* at 179. One bankruptcy court in the Fifth Circuit, *Singleton v. Abusaad (In re Abusaad)*, 309 B.R. 895 (Bankr. N.D. Tex. 2004), held that *Kalb v. Feuerstein* was "no longer the law, at least in the Fifth Circuit" because of the manner in which the Fifth Circuit distinguished it in *Sikes v. Global Marine*. *Singleton*, 309 B.R. at 898.

The Fifth Circuit's rationale in *Sikes v. Global Marine* comes from a reading of other provisions of the Bankruptcy Code that validate some transactions that are made in violation of the automatic stay unless they are avoided at the trustee's discretion. For example, Section 549 of the Bankruptcy Code deems post-petition transfers by the debtor, without court authorization, subject to being set aside. *Sikes v. Global Marine*, at 179. It also found that Section 542(c) ratified transfers by parties having no knowledge of the bankruptcy case and that "[i]f everything done post-petition were void in the strict sense of the word, these provisions would either be meaningless or inconsistent with the specific mandate of section 362(a)." *Id.* The Fifth Circuit reaffirmed its holding in *Chapman v. Bituminous Ins. Co. (In re Coho Res., Inc.)*, 345 F. 3d 338 (5th Cir. 2003). However, a creditor must seek a ratification of an action that may violate the automatic stay by requesting a "judicial cure" for its past actions in violation of Section 362. *See*, e.g., *Jones v. Garcia*, 63 F. 3d 411 (5th Cir. 1995) (foreclosure sale in violation of the automatic stay was validated by retroactive annulment of the automatic stay). This is not the case in the other circuits that have adopted the "void" rule, except for the Third, Sixth

and Eleventh which provide retroactive annulment for even "void" acts.

The Fourth Circuit and the Eighth Circuit have not taken positions on the void/voidable debate. *Winters ex rel. McMahon*, 94 F. 3d 130, 136 (4th Cir. 1996); *Riley v. United States*, 118 F. 3d 1220, 1222 n.1 (8th Cir. 1997).

4. An Opportunity to Answer a Longstanding Dilemma.

The federal courts are hopelessly divided over whether a violation of Section 362 is void or voidable and curable by retroactive annulment of the automatic stay under 11 U.S.C. § 362(d)(1). It would also be instructive to all bankruptcy courts on how to deal with stay violations on a uniform basis that is intended by the United States Constitution.

Almost 30 years have passed since Section 362 of the Bankruptcy Code was adopted. It has been almost 70 years since *Kalb v. Feuerstein* was decided under the Bankruptcy Act of 1898. A uniform standard for violations of the automatic stay is long overdue. *See*, e.g. "Violations of the Automatic Stay: Void or Voidable?" 23-4 ABIJ 20 (May 2004); Tobar, "The Need for Uniform Void Ab Initio Standard for Violations of the Automatic Stay," 24 Whittier L. Rev. 3 (Fall 2002); Barnes, "The Plain Meaning of the Automatic Stay in Bankruptcy: The Void/Voidable Distinction Revisited," 57 Ohio St. L. J. 291 (1996); Niccolini, "The Voidability of Actions Taken in Violation of the Automatic Stay: Application of the Information-Forcing Paradigm," 45 Vand. L. Rev. 1663, 1664 (1992).

B. **Because the courts are in conflict with regard to whether a stay violation is "void" or "voidable" under 11 U.S.C. § 362 this has created a conflict with regard to the "effect of dismissal" under 11 U.S.C. § 349(b). The conflict has also led to inconsistent results in state courts which must interpret Sections 349 and 362 if there is no follow-on bankruptcy proceeding.**

Because the issue of whether a stay violation is either "void" or "voidable" has not been resolved, this has led to confusion among the federal courts as to how to deal with stay violations that occurred during previous bankruptcy proceedings. Where there is no subsequent bankruptcy proceeding, then state courts are also divided over whether a stay violation is validated upon dismissal. There is no clear guidance from the federal courts. The Court should accept this petition because, like the first issue above, before this Court can determine "the effect of dismissal" under 11 U.S.C. § 349(b) it must be known whether a stay violation is "void" or "voidable" and can be cured by retroactive annulment under 11 U.S.C. § 362(d) (1) or whether retroactive annulment is required in a subsequent proceeding with regard to a stay violation that occurred in a previous bankruptcy proceeding.

1. The Effect of Dismissal under Section 349.

Section 349 of the Bankruptcy Code provides:

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice

the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

The legislative history of Section 349(b) provides that the basic purpose of subsection (b) is to "undo the bankruptcy case, as far as practicable . . ." H.R. No. 95-595, 95th Cong., 1st Sess. 337-38 (1977); S. R. No. 95-989, 95th Cong., 2d Sess. 48-9 (1978) The district court held that the introductory language of Section 349(b) suggested that the effect of the statute could be modified on a case-by-case basis "for cause," but that modification would have to be made at the time and as a part of the dismissal of the case. *In re Brown*, 330 B.R. 548, 554. App. B. In other words, in order to preserve an action to set aside a stay violation, the bankruptcy court could have conditioned dismissal of the previous bankruptcy proceedings upon preserving an action to set aside a stay violation in the dismissal order itself. Neither Brown nor any creditor requested the authority to maintain a cause of action against any creditor after dismissal.

2. A Dismissed Proceeding Cannot Be Reopened under Section 350.

Under 11 U.S.C. § 350 only a "closed" proceeding can be reopened. Section 350(a) provides that "after an estate is fully administered and the court has discharged the trustee, the court shall close the case." In a closed proceeding the court has fully administered the assets and the trustee is discharged. H. Rep. No. 95-595, 95th Cong., 1st Sess. 338 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 49 (1978) At least one court has refused to reopen a "closed" proceeding in order to lift the automatic stay because of a potential violation of the automatic stay because it no longer had jurisdiction over the property. *In re*: *Presidio Bridge Co., Inc.*, 124 B.R. 242 (Bankr. W.D. Tex. 1991).

A "dismissed" proceeding accomplishes a completely different result by restoring the property back to the position it held at the petition date. *Armel Laminates, Inc. v. Lomas & Nettleton Co. (In re Income Prop. Builders, Inc.)*, 699 F. 2d 963, 965 (9th Cir. 1982); *Critical Care Support Servs., Inc. v. U.S. (In re Critical Care Support Servs.)*, 236 B.R. 137, 140-41 (E.D. N.Y. 1999); *In re Woodhaven, Ltd.*, 139 B.R. 745, 747 (Bankr. N.D. Ala. 1992); *In re Garcia*, 115 B.R. 169, 170 (Bankr. N.D. Ind. 1990).

3. The Effect of Termination of the Stay under Section 362(c)(2).

In the case before the Court, the automatic stays of 11 U.S.C. § 362 during the two previous proceedings remained in effect until those proceedings were dismissed. 11 U.S.C. § 362(c)(2). Dismissal of the bankruptcy petition had the simultaneous effect of undoing the bankruptcy estate and lifting the automatic stay, just as the filing of the petition automatically and simultaneously created the bankruptcy estate and imposed the automatic stay. *In re Garnett*, 303 B.R. 274 (E.D. N.Y. 2003). Dismissal served as a forfeiture of the automatic stay that was in effect during those proceedings. *Barbieri v. RAJ Acquisition Corp.*, 199 F. 3d 616 (2d Cir. 1999).

As noted earlier, in the Fifth Circuit, if a creditor learns of its stay violation during the pendency of the proceeding, it can take action to retroactively annul the automatic stay under 11 U.S.C. § 362(d)(1) back to the petition filing date according to that circuit's holding in *Sikes v. Global Marine.* But if the creditor takes action in violation of the automatic stay and has no knowledge of the bankruptcy proceeding prior to dismissal, the creditor cannot reopen the proceeding to

validate its action because as noted above, a "dismissed" proceeding cannot be reopened under 11 U.S.C. § 350.

4. The Effect of Dismissal vs. Retroactive Annulment.

The bankruptcy court held that Petitioner's claim was unsecured on these grounds: (1) that the automatic stay was to protect an equitable distribution; (2) that the automatic stay applied regardless of whether Petitioner had notice; and (3) that the Fifth Circuit held that actions that violate the stay are voidable and that no compelling circumstances existed to annul the automatic stay under *In re Thornburg*, 277 B.R. 719, 731 (Bankr. E.D. Tex. 2002). App. C. The bankruptcy court refused to exercise its discretion to retroactively annul the automatic stay under 11 U.S.C. § 362(d)(1).

The bankruptcy court's opinion is silent on the "effect of dismissal" under Section 349(b) of the Bankruptcy Code. It can be assumed that the bankruptcy court believed that it had the power to retroactively annul the automatic stays during the previous bankruptcy proceedings because it refused to do so citing no compelling circumstances. Because of a complete absence of discussion of Section 349(b) by the bankruptcy court, it must be concluded that the bankruptcy court did not consider the "effect of dismissal" under Section 349(b) as a viable argument that validated Petitioner's actions. The bankruptcy court did consider the effect of dismissal at trial:

> THE COURT: Well, if any of the Fifth Circuit cases that you're citing to me . . . did any of them involve a stay which was being dealt with where

> the case in which the stay existed had been dismissed?

(Transcript of Proceedings, 9/27/2004 at 8).

The Fifth Circuit panel agreed with the bankruptcy court in its opinion:

> . . . the bankruptcy court correctly recognized that the dismissal of a bankruptcy proceeding does not necessarily retroactively validate actions taken in violation of an automatic stay.

App. A.

However, the bankruptcy court's opinion at Appendix C was not based on the holding that dismissal necessarily validated actions taken in violation of the automatic stay. As mentioned above, the bankruptcy court never cited to Section 349(b) nor discussed the "effect of dismissal" or the case law which was the primary basis for the district court's opinion. The district court considered Sections 349(b) and 362(d)(1) as separate and distinct grounds in analyzing Petitioner's actions. The Fifth Circuit has now affirmed the bankruptcy court's opinion on the basis of Section 349(b), which is a ground that was never reached by the bankruptcy court. *See*, App. A, App. C. Further, since the district court never passed on the bankruptcy court's refusal to retroactively annul the automatic stay under Section 362(d)(1), and assuming that retroactive annulment is still possible after dismissal, the Fifth Circuit should have remanded the case to the district court to determine whether the bankruptcy court erred in refusing to annul the automatic stay. *Administrator of EPA v. Pacific Legal Foundation*, 445 U.S. 198, 100 S.

Ct. 1095, 63 L. Ed 2d 329 (1980) (court does not address issues for the first time on appeal and remanded to the EPA for initial determination). *Singleton v. Wulff*, 428 U.S. 106, 120, 49 L. Ed 2d 826, 96 S. Ct. 2868 (1976) (appellate courts generally do not address issues not reached by the district court).

The district court's decision was the best reasoned. It followed the holdings of earlier cases such as *In re Linton*, 35 B.R. 695 (Bankr. D. Idaho 1983), *Norton v. Hoxie State Bank*, 61 B.R. 258 (D. Kan. 1986) and *Shell Oil v. Capital Financial Services*, 170 B.R. 903, 906 (S.D. Tex. 1994) that dealt with the precise issue that is before the Court. *In re Linton*, rendered in 1983 only a few years after the adoption of the Bankruptcy Code, correctly frames the issue:

> It is generally accepted that acts taken in violation of the stay, and thus in violation of the jurisdiction of the Bankruptcy Court, are void and without effect. *See Kalb v. Feuerstein*, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370 (1940); *First Security Bank of Idaho v. Ricks*, 26 BR 134, 83 IBCR 1 (B.C. D. *Id.* 1983). The language of § 349 restores "avoided" transfers, but it does not specifically address either those acts which might have been avoided but were not or those acts which might be viewed as jurisdictionally "void" rather than "avoidable."
>
> *Kalb* concerned an attempted foreclosure of a creditor's interest against property of the estate subsequent to the filing of the petition for relief under the Bankruptcy Act of 1898. Section 75 of the Act created a statutory stay similar to § 362 of

the existing Code. That case essentially established that an act of foreclosure taken in violation of the specific injunctive provisions of the federal bankruptcy statutes was subject to collateral attack in the bankruptcy proceeding and would therein be held void and a nullity. It does not expressly hold that such an act is void at all times or for all purposes. Nor does it discuss or intimate what result would have been reached had the bankruptcy proceeding been dismissed. However, Congress has, through § 349, implied that the purposes served by the avoiding powers of Title 11, Chapter 5, cease upon dismissal of the case. Though the Code does not expressly state that improper transfers not affirmatively avoided by a trustee should be treated in the same manner as those actually avoided, I see no persuasive reason why they should not be.

I thus conclude that, under the facts of this case, the perfection of the security interests in the collateral by Associates should be allowed to stand. I find no policy of the Code thwarted by this recognition of the interest of Associates. The primary function of the § 362 stay is to protect the assets of the estate for the benefit of creditors, so that an equitable distribution according to the statutory scheme can be effected. Upon dismissal, the need for this protection is eliminated. Section 349(b) recognizes this fact in its "reinstatement" of all transfers avoided during the pendency of the proceeding.

Eleven days prior to the district court's opinion below, a bankruptcy court in Michigan in the case of *In re*: *Pickett*, 325 B.R. 579 (Bankr. E.D. Mich. 2005) applied the same logic with regard to Section 349. In that case, the court held that where a judgment of foreclosure had been entered and a notice of judgment was filed during the pendency of a prior Chapter 13 proceeding that was later dismissed, the foreclosure was validated, thus rendering the debtor unable to retain whatever property interest it had remaining in a subsequent Chapter 13 proceeding:

> As noted, the Former Case was dismissed. Under 11 U.S.C. § 349, relating to the effect of dismissal, subsection (b)(3) provides that dismissal of a case, "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." (emphasis added). In this case, that entity was either the DNR or the taxing authority. In effect, the dismissal essentially annulled (i.e., terminated as noted) the stay and put the parties back where were at the time of the filing. *See Shell Oil Co. v. Capital Fin. Servs.*, 170 B.R. 903, 906 (S.D. Tex. 1994). Applied to the case at hand, such means that even if there was some merit to Debtor's argument about having had some sort of a justiciable interest in the Property at the time of the filing of the Former Case, the effect of the stay (and anything arguably done in violation thereof) in that case was lost upon dismissal of that case. So when the present case was filed, Debtor had no such interest in the Property which could be made the subject of a Chapter 13 plan . . .

Id. at 582.

In further support of Petitioner's position is *In re Sanderfer*, 2004 U.S. Dist. LEXIS 1139 (E.D. Tenn. 2004), that also follows the same rationale as the district court and is most analogous to this proceeding. In *Sanderfer*, a notice of federal tax lien was filed during the debtor's first bankruptcy proceeding. The bankruptcy court deemed the IRS to be unsecured because of its stay violation during the first proceeding. The district court reversed based on the Sixth Circuit holding in *Easley v. Pettibone Michigan Corporation*, 990 F.2d 905 (6th Cir. 1993). It deemed the perfection to be void but upon dismissal the property was revested in the debtor subject to the federal tax liens. The opinion said nothing about requiring the IRS to seek retroactive annulment of the automatic stay under Section 362(d)(1) based on its actions during the first bankruptcy proceeding that had been dismissed and could not have been reopened.

Also supporting Petitioner's position is *Camecho v. Homeq Servicing Corporation*, 311 B.R. 186 (Bankr. E.D. Mich. 2004), that involved a multiple bankruptcy filer. The debtor's first proceeding was under Chapter 13. During that proceeding the creditor filed an affidavit to create a lien against real estate of the debtor. The debtor did not contest the affidavit and it proposed to pay the creditor in a Chapter 13 plan. That proceeding was dismissed. The debtor then filed a Chapter 7 proceeding. The creditor participated in the second proceeding by filing a secured proof of claim. The creditor began foreclosure proceedings and then the debtor filed a third proceeding, a Chapter 13 proceeding to stay the foreclosure. The debtor contended, for the first time, that the creditor violated the automatic stay in the *first* proceeding. The court agreed that the creditor violated the automatic stays under Section 362(a)(4) and (5) but under

the *Easley* decision, the court held that the action was voidable and it refused to set aside the creditor's action citing to Section 349(b) and other factors such as the treatment of the claim in the prior proceedings.

The district court below recognized case law to the contrary, including *Elbar Inv. v. Pierce (In re Pierce)*, 272 B.R. 198, 211 (Bankr. S. D. Tex. 2001); *In re Prine*, 222 B.R. 610, 613 (Bankr. N.D. Iowa 1997), and *In re Lampkin*, 116 B.R. 450, 453 (Bankr. D. Md. 1990). It disagreed with those decisions because the conclusions in *Prine* and *Lampkin* were based on the concept that stay violations were void. *Elbar*, while arising in the Fifth Circuit, which had adopted the *voidable* rule, was based on the concept that a foreclosure sale in violation of the automatic stay was void unless there was retroactive relief from the stay. 272 B.R. at 210.

5. The State Courts Are in Conflict over the Effect of Dismissal on Stay Violations

Prior to *Sikes v. Global Marine*, the Supreme Court of Texas held in *Goswami v. Metropolitan Savings and Loan Association*, 751 S.W. 2d 487 (Tex. 1988) that stay violations were void and were not cured upon dismissal. *See also*, *Huddleston v. Texas Commerce Bank-Dallas, N.A.*, 756 S.W.2d 343 (Tex. App. – Dallas 1988, writ denied). But in 1996 an intermediate Texas appellate court held that an order of confinement for failure to pay child support that was entered while a debtor was in a bankruptcy proceeding was validated upon dismissal. *Ex Parte Binse*, 932 S.W. 2d 619 (Tex. App. - Houston [14th Dist.] 1996, no pet.). This holding was based on the *Shell Oil Capital* decision. The appellate court did not mention a requirement for retroactive annulment

of the automatic stay, which the Supreme Court of Texas had mentioned in *Goswami*. *Binse* would appear to be in conflict with *Goswami*, except that *Goswami* was decided at a time when stay violations were thought to be void, not voidable. But the "void" argument was carried further in a 2001 opinion in *Oles v. Curl*, 65 S.W.3d 129 (Tex. App. – 2001) another Texas appellate court that held that stay violations were void. The Amarillo court reversed a summary judgment on the grounds that there could be no transfer of real estate based on a void act. The Amarillo Court of Appeals showed its frustration with the conflict over the "void" versus "voidable" rule and called upon the Texas Supreme Court to revisit the issue:

> However, the Supreme Court may wish to revisit the issue given that it has intimated that an automatic stay may be annulled to validate actions taken in contravention of 11 U.S.C. § 362. *Goswami v. Metropolitan Sav. & Loan Ass'n.*, 751 S.W.2d 487, 489 (Tex. 1988). Simply put, if a supposedly void act can be validated then the act cannot actually be void. This is so because a void act is a nullity. *Brazzel v. Murray*, 481 S.W.2d 801, 803 (Tex. 1972) (distinguishing between a void and voidable act); *In re Moreno*, 4 S.W.3d 278, 280-81 (Tex. App.—Houston [14th Dist.] 1999, no writ) (doing the same). And, being a nullity, it cannot be ratified. *Id.* So, there appears to be some conflict between *Goswami* and *Continental Casing* which the Supreme Court may wish to settle.

Id. at 132.

In Arkansas, the appellate court in *Tim Wargo & Sons, Inc. v. The Equitable Life Assurance Society of the United States*, 34 Ark. App. 216, 809 S.W. 2d 375 (1991) followed the voidable rule in its holding:

> Since we have concluded that the transfer at issue was voidable, we point out an additional reason for affirmance. Under 11 U.S.C. § 349(b)(1), the dismissal of a case reinstates those transfers avoided during the bankruptcy action. The court in *In re Linton*, 35 B.R. 695 (Bkrtcy. D. Idaho 1983), found that improper transfers not affirmatively avoided during bankruptcy should be treated in the same manner as those actually avoided. According to this view, the dismissal of the appellant's bankruptcy action would have the effect of reinstating this transfer, which we must assume was not avoided during the bankruptcy proceeding.

Id. at 223.

Likewise, a California appellate court has apparently adopted the voidable rule by holding that dismissal would validate the action that would otherwise violate the automatic stay. *See Valencia v. Rodriquez*, 87 Cal. App. 4th 1222, 105 Cal. Rptr. 2d 281 (2001)(dismissal serves to validate a settlement agreement even if precluded by the automatic stay).

As long as there are dismissals of bankruptcy proceedings, the state courts will continue to inconsistently interpret the impact of Section 349(b) upon stay violations under Section 362.

6. Was Brown's Objection to Petitioner's Lien Rendered Moot upon Dismissal?

The Tenth Circuit holds that a request to lift the automatic stay becomes moot upon dismissal of a petition in bankruptcy and the bankruptcy court loses jurisdiction to decide the motion. *Gardens of Cortez v. John Hancock Mutl. Life Ins. Co.*, 585 F. 2d 975, 978 (10th Cir. 1978). The Fifth Circuit has also held that dismissal of a bankruptcy proceeding renders a creditor's attempt to reject a lease under Section 365 moot. *In re Petty*, 848 F. 2d 654 (5th Cir. 1988) *cert. denied*, 488 U.S. 1009, 109 S. Ct. 794, 102 L. Ed. 2d 785 (1989). Accordingly, if dismissal renders such actions moot, the bankruptcy court loses subject matter jurisdiction to continue the automatic stay provisions after dismissal. *In re Solar Equipment Corporation*, 19 B.R. 1010 (5th Cir. 1982).

Brown's objection to Petitioner's proof of claim on the grounds that Petitioner violated the automatic stays in the prior proceedings was rendered moot because Petitioner could not have sought retroactive annulment of the automatic stay while those proceedings were pending. City Bank, as a single creditor, had no standing to object to Petitioner's proof of claim because creditors have no standing to object to stay violations. *In re Pointer*, 952 F.2d 82 (5th Cir. 1992) Since Brown's objection was moot and City Bank had no standing, there was no subject matter jurisdiction over the objection to Petitioner's proof of claim. Further, the avoidance of Petitioner's lien could only come by way of an adversary proceeding, not by an objection to Petitioner's proof of claim, which was the method used by City Bank and later joined on appeal by the Trustee. Bankruptcy Rule 7001(2); *In re Kinion*, 207 F. 3d 751 (5th Cir. 2000); *Cen-Pen Corp. v. Hanson*, 58 F. 3d 89 (4th Cir. 1995).

This Court should reverse the Fifth Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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